**U.S. Department of Labor**

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**Issue date: 05Jun2001**

CASE NO.: 2000-LHC-2965

OWCP NO.: 07-151861

IN THE MATTER OF

DONATO CORTEZ,
Claimant

v.

SWIFTSHIPS, INC. CO.,
Employer

and

LOUISIANA WORKERS' COMPENSATION CORP.
Carrier

APPEARANCES:

Gregory W. Allen, Esq.
On behalf of Claimant

William C. Cruse, Esq.
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

## DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et. seq., brought by Donato Cortez (Claimant) against

Swiftships Inc. Co. (Employer) and Louisiana Workers' Compensation Corp. (Carrier).

The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held before me on April 2, 2001 in Houston, Texas.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced 11 exhibits which were admitted, including medical reports from Drs. W. J. Johnson (Johnson), Jeffrey C. Fitter (Fitter), F. J. Hoffman (Hoffman), records from Morella Physical Therapy Clinic, Claimant's IRS, wage records and answers to Employer interrogatories, documents from various employers showing Claimant's pre-injury wages, DOL documents, and Employer's response to Claimant's request for admissions.[1] Employer called 3 witnesses, Human Resources Manager, Elaine Singleton (Singleton) Claimant's supervisor, Emelio Salazar (Salazar), and vocational expert, Allen Crane (Crane), and introduced 10 exhibits (Exs-2, 3, 4, 5, 11, 12, 15, 16, 18, 20) which were admitted including Claimant's response to Employer request for production of documents, Claimant's Social Security records , worker's compensation payments to Claimant, vocational report of Crane, accident investigation report, medical records of Fitness and Rehabilitation Services, note of Bernie Breaux showing offer of light duty, earnings records of Antonio Cornejo, Jose Cornejo and Nathan Montgomery.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

## I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. Claimant was injured on November 20, 1998.

2. Claimant's injury occurred during the course and scope of his employment with Employer.

3. Claimant reached maximum medical improvement (MMI) on January 1, 2000.

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[1] References to the transcript and exhibits are as follows: trial transcript- Tr.__; Claimant's exhibits- CX-__, p.__; Employer exhibits- EX-__, p.__; Administrative Law Judge exhibits- ALJX-__; p.___.

4. An employer/employee relationship existed at the time of the injury.

5. Employer filed a Notice of Controversion on June 18, 1999.

6.. An informal conference was held on February 8, 2000.

7. Employer paid Claimant temporary total disability from January 11, 1999 to May 16, 1999 for a total of 18 weeks at the weekly rate of $236.78 for a total compensation of $4,507.77.

## II. ISSUES

The following unresolved issues were presented by the parties:

1. The appropriate average weekly wage.

2. Nature and extent of injury.

3. Suitable alternative employment.

4. Interest and Attorney Fees.

## III. STATEMENT OF THE CASE

### A. Chronology:

Claimant is a 63 year old male born on October 22, 1938 in Michoacan, Mexico. Claimant has no formal education with an ability to speak only Spanish and no understanding of any English whether written or spoken. Claimant can do simple counting, but otherwise, has no math abilities. (Tr. 39, 40, 48). Prior to his employment with Employer Claimant performed unskilled manual labor mowing lawns, watering plants and working in Mexican restaurants earning a maximum annual income of about $6,557.00. (Cxs-7,9; EX-11; and Tr. 50)[2]

[2] Social Security records show Claimant's primary source of income prior to Employer coming from El Superior Mexican Restaurant in Clute, Texas and from Classic Industrial Services, Inc. out of

Claimant began working for Employer on August 21, 1998 as a labor/helper at its Morgan City, Louisiana shipyard where it constructs new vessels employing about 150 employees. Employer's facilities consist of a large warehouse and fabrication building and a yard facility which serves as a dry dock for new vessels. (Tr. 41, 135) Claimant obtained his job with Employer through the assistance of his supervisor, Emilio Salazar (Salazar) who is fluent in both Spanish and English, lived near Claimant in Clute, Texas and drove him to Morgan City where he stayed in company paid for apartments only to return to Clute on an occasional basis when Salazar drove home. (Tr. 42, 43, 106-108). Claimant worked from August 21, 1998 through January 10, 1999 when forced to quit because of an on the job injury.[3]

Claimant made $8.00 per hour with time and one half after 40 hours per week and worked under Salazar's immediate supervision. As a laborer/helper, Claimant performed unskilled light to medium janitorial duties of cleaning up scrap iron weighing up to 30 pounds, picking up trash in the yard and on vessels, sweeping and or mopping vessels using a shop broom, operating an electric grinder or wire brush to polish vessel components and delivering pipes to craft employees. (Tr. 45, 46; EX-3).

On November 20, 1998, while on board a vessel (hull 494), Claimant tripped over an angle iron in the engine room and fell on his right shoulder. (CX-10, pp.1, 2; Tr. 49). Claimant reported the injury the same day to Salazar, but apparently, received no treatment until November 24, 1998 when he went to the Industrial Medical Clinic and was treated by Dr. W. H. Johnson who ordered x-rays and diagnosed a right shoulder sprain and restricted Claimant to light duty. (CX-1, p.1). Dr. Johnson continued to treat Claimant for shoulder pain on December 1, and 7, 1998 , prescribing therapy, recommending an MRI, and referring him to orthopedist, Dr. Jeffery Fitter (Fitter), because of concerns about a possible rotator cuff tear. (CX-1, p. 2).

Claimant underwent therapy without apparent success and subsequently saw Dr. Fitter (CX-2). Dr. Fitter saw Claimant on December 10, 1998, and after examining him and reviewing the MRI noted Claimant to be in substantial pain with a massive rotator cuff tear of the right shoulder and recommended surgery, but advised that surgery might only repair part of the tear leaving Claimant with persistent loss of shoulder abduction. (CX-3). Employer apparently sent Claimant for a second opinion to orthopedist, Dr. A.D. Walker who agreed with

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Baton Rouge, Louisiana. The record does not reveal the nature of his employment with Classic Industrial.

[3] Following the November 20, 1998 injury, Claimant could only remember about 3 weeks of light duty work. However, it is clear from payroll records and the testimony of Human Resources Manager, Elaine Singleton, that Claimant continued to work light duty an additional 7 weeks post injury. (Tr. 86).

Dr. Fitter's assessment. (CX-4).

Claimant elected to undergo surgery near his home and chose orthopedist, Dr. F. J. Hoffman who saw Claimant on January 11, 1999, and operated on him on January 21, 1999, performing various surgical procedures on the right shoulder including arthroscopy, debridement of glenoid labral tear, open decompression, subacromial bursectomy, releases and resection of coracoacromial ligament and repair of massive rotator cuff tear. (CX-5, pp. 2 8, 10). Thereafter, Dr. Hoffman continued to see Claimant on January 25, February 1, and 22, March 15, April 15, May 5, July 7, 1999. Following surgery, Claimant underwent 33 therapy sessions. (EX-5).

In a fax to Employer dated May 12, 1999, Dr. Hoffman advised that Claimant had been released to light duty effective February 22,, 1999 involving use of only one arm. (CX-5, p.6). Notes from the office visit of February 22, 1999 show a marked decrease in pain and slight tenderness. In a letter dated December 13, 1999, to Attorney J. Bruce Willis, Dr. Hoffman stated that Claimant would reach maximum medical improvement (MMI) effective January, 2000, and had a massive rotator cuff tear that could not be completely repaired restricting him from longshore activities with an inability to do repetitive, overhead heavy lifting with no climbing, and lifting more than 50 pounds from the ground. Dr. Hoffman also noted, that Claimant would have arthritis in the shoulder necessitating the use of anti-inflammatory medicines. (CX-5 p.1).

**B. Claimant's Testimony**

Claimant testified about his education and work for Employer describing his initial 14 weeks of full duty prior to injury under Salazar's supervision as unskilled labor cleaning up debris and metal parts, delivering pipe elbows to craft workers and occasionally doing overhead work at various locations throughout Employer's facility. Following his November 28, 1998 shoulder injury, Salazar assigned Claimant light duty in which he gathered paper and swept up debris. (Tr. 46, 47).

Claimant testified that before his injury and subsequent surgery, he used both arms including his right dominant hand to perform all tasks including overhead work. Since the surgery Claimant has been limited to the use of his left arm and has continued to experience severe pain on a constant basis in his right shoulder preventing him from sweeping or cleaning, and thus, doing the essential functions of either his former full or light duty worker. In addition, the pain prevents him from sleeping on his right side or lifting his right hand any higher than his face. (Tr. 50-52). Claimant admitted that following his surgery in May, 1999, Salazar came to his home and offered him light duty which he declined because of his pain condition. (Tr. 60-62, 68). Claimant admitted that Dr. Hoffman released him to light work,

but that he had been unable to work except for watering plant making about $150.00 to $175.00 per week starting in May, 1999, when Employer ceased disability payments. Prior to his employment with Employer, Claimant earned between $250.00 and $275.00 per week doing a full range of yard work. (Tr. 63, 69).

**C. Testimony of Elaine Singleton**

Elaine Singleton (Singleton), Employer's Human Resources Manager for the past 14 years, testified that Employer routinely provided light duty jobs in many locations on a permanent basis to accommodate physical limitations of injured workers. In Claimant's case, Singleton testified that she was aware of Claimant's physical limitations and in accord with company policy sent Salazar, who spoke Spanish, to offer Claimant a light duty helper job that would conform with these restrictions. ( Tr. 77, 78). In accord with her instructions, Salazar, on May 12, 1999, offered Claimant a light duty helper job which Claimant never accepted. (Tr. 86-88).

According to Singleton, Employer had light duty helper work in several departments which was similar to the light duty work Claimant did for 7 weeks after his injury. (Tr.84-88). This light duty did not involve grinding, climbing stairs or ladders or crawling or kneeling in tanks, and thus, fit Claimant's medical restrictions. (Tr. 90, 91). Singleton then described a specific light duty job of tool room clerk ( EX-3, pp. 6 ,7) that was available for Claimant in May, 1999, which fit Claimant's restrictions and which Claimant could allegedly do notwithstanding his inability to understand any English saying that if Claimant ran into a problem he could always go to his supervisor (Chris Adams) for assistance. This job like other light duty helper positions paid $8.00 per hour and involved shelving mostly at eye level with variable hours depending upon what the other crafts worked and was permanent in nature. (Tr. 92-94, 104).

On cross, Singleton said that Employer currently had 3 employees employed in light duty positions out of a workforce of 150, and that Claimant could sweep with just one hand not needing to use a dust receptacle and that if he needed assistance he would be given such, although, she could not identify who would provide the help because other helpers worked with craft employees. (Tr. 97-99).

Regarding the issue of average weekly wage, (AWW), Singleton testified that the amount of overtime available for helpers and other workers depends upon the size of the vessel and the delivery schedule with shorter delivery schedules resulting in more available overtime. (Tr.78,79). She then identified 3 other helpers allegedly comparable to Claimant, whose hours should be used to determine an appropriate AWW for Claimant. They were: Nathan Montgomery, Antonio Cornejo and Jose Cornejo. All of these employees were full time

helpers who were paid the same rate of pay as Claimant and had worked substantially the entire year prior to Claimant's injury. Singleton admitted, however, that the hours worked by these helpers were also determined by personal motivation, use of personal and sick days as well as production schedules. (Tr. 80-84).

On cross, Singleton admitted not knowing the ship or hull Claimant was working on when injured, but stated that the vessel was about 150 feet long and could take 9 to 15 months to finish. (Tr. 99-101). Singleton also admitted that she did not know the weight of objects in the tool room, but was aware of impact wrenches in there weighing 60 to 70 pounds, but contended that Adams would provide Claimant with whatever assistance he needed. Singleton did not explain how Adams would communicate with Claimant when attempting to honor a written material request (Tr. 102-105).

**D. Testimony of Emelio Salazar**

Salazar, Claimant's immediate supervisor, testified that he helped Claimant obtain work with Employer, driving him to the work site from Clute, Texas. Salazar described Claimant's work before and after the accident, but was unable to remember the stage of vessel construction when Claimant was injured. (Tr. 109,110). Salazar estimated that Claimant worked about 7 weeks after the injury doing light helper work picking up paper and small pieces of scrap metal. (Tr. 111, 112).

Salazar described the offer of light duty in May, 1999, as consisting of essentially the same type of work Claimant had done for 7 weeks following the injury which involved work on decks of vessels as well as the yard, but no grinding, or climbing or overhead work. (Tr. 116, 117).

Salazar testified that after making the offer Claimant responded that he still hurt and never accept the offer and further that he had no reason to disbelieve Claimant's pain complaints. Salazar also testified, that Claimant complained of shoulder pain even when doing the light duty after the injury, but nonetheless, did what was assigned. (Tr. 113, 114)

On cross, Salazar admitted that Employer was involved in a dangerous business where it was preferable to have employees with full use of both hands and was unaware of Employer employing any employee with use of just one arm. (Tr. 119, 120,122). Salazar testified that Nathan Montgomery, Antonio Cornejo and Jose Cornejo worked on the same vessel as Claimant but worked less hours because they were not as dependable and highly motivated as Claimant who worked as much overtime as possible. (Tr. 125-127). Salazar also admitted that Chris Adams was not fluent in Spanish. (Tr. 128).

**E Testimony of Allen Crane**

Crane, a license vocational rehabilitation counselor, testified about an on site analysis of Claimant's job duties involving meetings with Salazar and Adams. His analysis appears as EX-3 as is dated September 18, 2000. This report essentially confirmed the helper duties as described by Claimant and Salazar which involved picking up small objects such as scrap metal and trash, sweeping and mopping. Crane classified this work as light to medium with occasional twisting, crawling, climbing, kneeling , frequent bending, and squatting and constant reaching and fine and gross hand manipulation. The report also described the job of tool room clerk involving sedentary and light work monitoring and handing out warehouse supplies with light duty cleaning. According to Crane ,the tool room clerk sat at a tool room window and handed out supplies to employees who had filled out the necessary requisitions. When paper work was missing, it was the responsibility of the clerk to make sure the employee filled out the proper forms. On occasion, the clerk swept the warehouse and re-shelved items weighing less than 20 pounds. Crane admitted that Claimant's inability to understand or talk in English was a barrier, but not an insurmountable one that could be overcome with unidentified signals. (Tr. 138-141). Crane thought Claimant could do the warehouse job per Dr. Hoffman's restrictions. (Tr. 142-143).

On cross, Crane admitted that Claimant would have difficulty doing light duty work with only the use of the non-dominant arm and would require some adaption by Claimant and would have to rely upon Adams' assistance. (Tr. 144-146). He also admitted it would be very difficult to place Claimant in outside employment given his age, mental and physical limitations. (Tr. 147-148).

**G. Payroll records of Claimant, Nathan Montgomery, Antonio Cornejo and Jose Cornejo**

EX-12 ,payroll records of Claimant from August 21, 1998 to his injury to November 20, 1998 , showed Claimant during this 14 week period making $7,761.00 with an AWW of $554.36 with an average of 19.53 hours of overtime per week. During the same period Antonio Cornejo made $6,441.00 or an AWW of $460.12 with an average of 11.68 hours of overtime per week. In the same period, Jose Cornejo made $5,974.11 or an AWW of $426.73l with an average of 8.89 hours of overtime per week (EX-16). Nathan Montgomery made $5,138.00 or an AWW of $367.00 with an average of 3.92 hours per week.

During the past 52 weeks prior to Claimant's injury, payroll records also showed Nathan Montgomery working 46 weeks making a total of $17,143.63 or an AWW of $372.69. Antonio Cornejo worked the entire period making $23,402.60 or an AWW of $450.05 while

Jose Cornejo made $22,595.55 over a 51 period for an AWW of $443.05.

## IV. DISCUSSION

### A. Contention of the Parties

Claimant contends that neither Section 10 (a) or Section 10 (b) of the Act apply since Claimant did not work a substantial part of the preceding year prior to his injury in shipyard construction, and Employer failed to show the existence of comparable employees so as to use their wages to compute Claimant's AWW under Section 10 (b) of the Act. Since neither Section 10(a) or 10(b) apply, Claimant argues I must look to and apply Section 10(c) of the Act in determining temporary total and permanent partial disability. (TTD, PPD). Claimant contends that under Section 10(c), I should take Claimant's total wages over the 14 weeks prior to injury ($7,761.00) and divide that by 14 weeks to arrive at an AWW of $554.36 with a corresponding compensation rate of $369.57 and then award Claimant TTD from January 11, 1999 when he stopped work through May 16, 1999 after which returned to limited yard maintenance making between $150.00 to $175.00 per week in contrast to $250.00 to $275.00 per week he made prior to his employment with Employer when he worked full time doing a full range of yard maintenance duties.

Claimant further contends that Employer failed to establish any suitable alternative employment because he was unable to do any of the light work offered to him or the light duty tool room attendance job which Employer claimed it had available for him in May, 1999. Thus, the only apparent suitable work which Claimant could do was light duty yard maintenance earning between $150.00 to $175.00 per week making Claimant due temporary partial disability (TPD) from May 17, 1999 to December 31, 1999, and permanent partial disability (PPD) from January 1, 2000, when Claimant reached MMI to the the present and continuing based upon this new and reduced earning capacity.

Employer on the other hand contends that Section 10(b) should apply because it identified 3 comparable employees (Nathan Montgomery, Antonio Cornejo, and Jose Cornejo) and that to base an AWW on the weekly average of Claimant's earnings would inflate the AWW by giving him overtime that would not have been available at the same rate throughout the previous year. Further, Employer contends that it identified SAE by its offer of light duty helper work on May 12, 1999, and by identifying the warehouse/tool room job which existed at the same time and would have been made available to Claimant at the same rate of pay. Thus, Employer would apparently try to avoid liability for either TPD or PPD following the May 12, 1999 offer.

**B. Credibility of Parties**

It is well-settled that in arriving at a decision in this matter, the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, *reh. denied*, 391 U.S. 929 (1968); Todd Shipyards Corporation v. Donovan, 300 F.2d 741 (5th Cir. 1962); Atlantic Marine, Inc., and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981).

It has been consistently held that the Act must be construed liberally in favor of the claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). The United States Supreme Court has determined, however, that the "true doubt" rule which resolves factual doubt in favor of a claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556 (d) and that the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), *aff'g* 990 F.2d 730 (3rd Cir. 1993).

In this case, I was particularly impressed by Claimant and Salazar's testimony, especially regarding Claimant's work ethic and level of pain he sustained as a result of the injury both pre and post-surgery. Although deprived of the benefits of any formal education, Claimant testified in a generally straight forward and clear manner readily admitting his physical and mental limitations and his post-injury earnings despite an unsuccessful surgery and advanced age. Even pre-injury Claimant exhibited greater work motivation than the alleged comparable, younger employees working overtime whenever it was available.

**C. Nature and Extent of Injury**

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial).

A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649 (5th Cir. 1968); Seidel v. General Dynamics Corp., 22 BRBS 403, 407 (1989); Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is

permanent or temporary is to ascertain the date of maximum medical improvement (MMI). The determination of when MMI is reached so that a claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. Hite v. Dresser Guiberson Pumping, 22 BRBS 87, 91(1989). Care v. Washington Metro Area Transit Authority, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. Lozada v. General Dynamics Corp., 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); Sinclair v. United Food & Commercial Workers, 13 BRBS 148 (1989); Trask v. Lockheed Shipbuilding & Construction Co., 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, Leech v. Service Engineering Co., 15 BRBS 18 (1982), or if his condition has stabilized. Lusby v. Washington Metropolitan Area Transit Authority, 13 BRBS 446 (1981).

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038, 14 BRBS 156 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977); P&M Crane Co. V. Hayes, 930 F.2d 424, 429-30 (5th Cir. 1991); SGS Control Serv. v. Director, Office of Worker's Comp. Programs, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. Elliot v. C&P Telephone Co., 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. Walker v. Sun Shipbuilding & Dry Dock Co., 19 BRBS 171 (1986).

Once the prima facie case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. Turner, 661 F.2d at 1038; P&M Crane, 930 F.2d at 430; Clophus v. Amoco Prod. Co., 21 BRBS 261 (188). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. Palombo v. Director, OWCP, 937 F.2d 70, 25 BRBS 1 (CRT)(D.C.Cir. 1991); Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991). An employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. An employer can meet its burden by offering the injured employee a light duty position at its facility, as long as the position does not constitute sheltered employment. Darden v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 224 (1986). If the employer does offer suitable work, the judge need not examine employment opportunities on the open market. Conover v. Sun Shipbuilding & Dry Dock Co., 11 BRBS 676, 679 (1979). If employer does not offer suitable work at its facility, the Fifth Circuit in Turner, established a two-pronged test by which employers can satisfy their alternative employment burden:

> (1) Considering claimant's age, background, etc., what can claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within this category of jobs that a claimant is reasonably capable of performing, are these jobs reasonably available in the community for which the claimant is able to compete and he could realistically and likely secure? This second question in effect requires a determination of whether there exists a reasonable likelihood, given the claimant's age, education, and vocational background that he would be hired if he diligently sought the job.

661 F.2d at 1042; P&M Crane, 930 F.2d at 430.

If the employer meets its burden by establishing suitable alternative employment, the burden shifts back to a claimant to prove reasonable diligence in attempting to secure some type of alternate employment shown by the employer to be attainable and available. Turner, 661 F.2d at 1043. Termed simply, the claimant must prove a diligent search and the willingness to work. Williams v. Halter Marine Serv., 19 BRBS 248 (1987). Moreover, if claimant demonstrates that he diligently tried and was unable to obtain a job identified by the employer, he may prevail. Roger's Terminal & Shipping Corp. v. Director, OWCP, 748 F.2d 687, 18 BRBS 79 (CRT)(5th Cir.), *cert. denied*, 479 U.S. 826 (1986). If a claimant fails to satisfy this "complementary burden," there cannot be a finding of total and permanent disability under the Act. Turner, 661 F.2d at 1043; Southern v. Farmers Export Co., 17 BRBS 64 (1985).

Even a minor physical impairment can establish total disability if it prevents the employee from performing his usual employment. Elliot v. C & P Tel. Co., 16 BRBS 89,92 (1984); Equitable Equip. Co. v. Hardy, 558 F.2d 1192 (5th Cir. 1977). Claimant's credible complaints of pain alone may be enough to meet this burden. Mijangos v. Avondale Shipyards, Inc., 948 F.2d 941 (5th Cir. 1991); Golden v Eller & Co., 8 BRBS 846 (1978), aff'd, 620 F.2d 71 (5th Cir. 1980) Once a claimant makes a *prima facie* showing the burden shifts to the employer to show suitable alternative employment. Clophus v. Amoco Pro.Co., 21 BRBS 261 (1988). A failure to prove suitable alternative employment results in a finding of total disability. Manigualt v. Stevens Shipping Co., 22 BRBS 332 (1989); MacDonald v. Trailer Marine Transp. Corp., 18 BRBS 259 (1986).

In the present case I am convinced, notwithstanding Dr. Hoffman's restrictions, that Claimant has continued to suffer severe pain following the surgery which has prevented him from doing the light duty offered him or the warehouse/tool room position, that was never offered but allegedly available to him, had he returned to work for Employer. Salazar told Claimant he would be doing the same type of light work he had done following the accident. Claimant experienced pain doing this, informed his supervisor of this problems, and suffered through his condition until surgery was the only option.

I am also convinced, notwithstanding testimony from Employer's witnesses, including vocational expert, Crane, that Claimant would not have been able to function in a competitive manner in the tool room in that he did not understand any English and the tool room supervisor was not fluent in Spanish. At most, Claimant would have been able to take requisition slips from employees and simply take this to Adams who would have to pull the requested items. I do not credit Crane that Claimant could have been pulled items simply by unidentified hand signals from unidentified individuals. As such, even if Claimant had returned to work, his work would have been no more than sheltered, non-competitive employment, which does not qualify as SAE.[4] Thus, I find that none of the jobs identified by Employer were suitable for Claimant. Accordingly, Employer failed to meet its burden of showing SAE and Claimant is entitled to TTD from January 11, 1999 to May 16, 1999.

After May 16, 1999, Claimant demonstrated a post-injury earning capacity by performing limited yard maintenance duties averaging between $150.00 and $175.00 per week. Thus, he is entitled to an award of temporary partial non-scheduled disability based on the difference between Claimant's pre-injury average weekly wage and his post-injury wage earning capacity. In determining wage earning capacity Section 8(h) provides that claimant's earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his true earning capacity. In this case since there are no wage records showing the actual weekly post-injury yard earnings, and taking into account Claimant's very limited math skills, I find that an average of these two amounts ($162.50) represents a fair estimate of his weekly earning potential realizing that on some weeks he makes nothing or at most $50.00. (Tr. 68).

**D. Average Weekly Wage**

Section 10 of the Act establishes three alternative methods for determining a Claimant's average annual earning capacity, 33 U.S.C. § 910(a)-(c), which is then divided by 52 to arrive at the average weekly wage, 33 U.S.C. § 910(d)(1). Empire United Stevedores v. Gatlin, 936 F.2d 819, 821 (5th Cir. 1991). Consequently, the initial determination I must make is under which of the alternatives to proceed.

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[4] The fact that Crane could not place Claimant in outside competitive employment is but one important factor is considering the true nature of the work offered Claimant. Another important fact, is the limited usefulness of Claimant doing any tool room work being essentially limited to relaying work requisitions to Adams who would then have to either pull the item or take Claimant to the location of item in question and manually pull it with Claimant.

**1. Section 10(a)**

Section 10(a), which focuses on the actual wages earned by the injured worker, is applicable if the Claimant has "worked in the same employment ... whether for the same or another employer, during substantially the whole year immediately preceding his injury." 33 U.S.C. § 910(a). Empire United Stevedores, 936 F.2d at 821; Duncan v. Washington Metro. Area Transit Authority, 24 BRBS 133, 135-36 (1990). In this matter, the nature Claimant's work was clearly intermittent and not steady or regular enough to be characterized as substantially the whole of the year.

**2. Section 10(b)**

Where Section 10(a) is inapplicable, the courts have found that application of Section 10(b) must be explored prior to the application of Section 10(c). Palacios v. Campbell Indus., 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980), *rev'g* 8 BRBS 692 (1978). Section 10(b) applies to an injured employee who was working in permanent or continuous employment at the time of injury, but did not work "substantially the whole year" prior to his injury within the meaning of Section 10(a). Empire United Stevedores, 936 F.2d at 821; Duncan, 24 BRBS at 153; Lozupone v. Lozupone & Sons, 12 BRBS 148, 153 (1979). Section 10(b) uses the wages of other workers in the same employment situation as the injured party and directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole year preceding the injury, in the same or similar employment, in the same or neighboring place. 33 U.S.C. § 910(b). However, where the wages of the comparable employee do not fairly represent the wage earning capacity of the injured claimant, Section 10(b) should not be applied. Palacios, 633 F.2d at 842; Hayes v. P & M Crane Co., 23 BRBS 389, 393 (1990), *vac'd in part on other grounds*, 24 BRBS 116 (CRT) (5th Cir. 1991); Lozupone, 12 BRBS at 153.

Here the Employer contends that I should use the wages of 3 allegedly comparable employees, (Nathan Montgomery, Antonio Cornejo and Jose Cornejo), to arrive at the appropriate AWW for Claimant. While it is true that all workers were classified the same as Claimant (helper) and received the same hourly wage ($8.00 per hour) and worked on the same vessel as Claimant, none of these younger workers demonstrated the work ethic and desire to work as much overtime as Claimant who apparently from Salazar's own admission worked all available overtime as opposed to the others who by choice decided to work less. As such, I find it would not be reasonable or fair to Claimant to use the wages of these 3 employees, who as indicated above worked substantially less overtime per week, when computing Claimant's AWW.

**3. Section 10(c)**

If neither of the previously discussed sections can be applied "reasonably and fairly", then determination of Claimant's average annual earnings pursuant to Section 10(c) is appropriate. Empire United Stevedores v. Gatlin, 936 F.2d 819, 821 (5th Cir. 1991); Walker v. Washington Metro. Area Transit Authority, 793 F.2d 319 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987); Browder v. Dillingham Ship Repair, 24 BRBS 216, 218 (1991). Section 910(c) provides:

> [S]uch average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. § 910(c).

The judge has broad discretion in determining the annual earning capacity under Section 10(c), Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 105 (1991), Wayland v. Moore Dry Dock, 25 BRBS 53, 59 (1991), keeping in mind that the prime objective of Section 10(c) is to "arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of injury." Cummins v. Todd Shipyards, BRBS 283, 285 (1980). In this context, earning capacity is the amount of earnings Claimant would have had the potential and opportunity to earn absent the injury. Jackson v. Potomac Temporaries, Inc., 12 BRBS 410, 413 (1980); Walker v. Washington Metro. Area Transit Authority, 793 F.2d 319 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987).

When making the calculation of Claimant's annual earning capacity under Section 10(c), the amount actually earned by Claimant is not controlling. National Steel & Shipbuilding v. Bonner, 600 F.2d 1288 (1979), *aff'g in relevant part*, 5 BRBS 290 (1977). Therefore, the amount Claimant actually earned in the year prior to his accident is a factor, but is not the over-riding concern, in calculating wages under Section 10(c). Empire United Stevedores, 936 F.2d at 823.

In this case, I am convinced that the only fair way to properly determine an AWW for Claimant is to use is pre-injury wages ( $7,761.00) and divide that by the number of weeks he worked pre-injury (14) to arrive at an AWW of $554.36 with a corresponding rate of $369.57. While overtime may vary at the shipyard based upon production levels, there is no credible

evidence of record to make me believe that Claimant would have worked less hours than what he earned pre-accident especially when the vessel Claimant was working on involved considerable work to be completed at the time of Claimant's injury.

**E. Interest**

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., *aff'd in pertinent part and rev'd on other grounds, sub nom*. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills..." Grant v. Portland Stevedoring Company, et. al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See* Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

**E. Attorney Fees**

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

## V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability (TTD) compensation pursuant to Section 908(b) of the Act for the period from January 11, 1999 to May 16, 1999, based upon an average weekly wage of $ 554.36 with a corresponding compensation rate of $369.57.

2. Employer shall pay to Claimant temporary partial disability (TPD)compensation pursuant to Section 908(e) at the rate of $261.24 representing 2/3 of the difference between Claimant AWW ($554.36) and his post-injury earning capacity of $161.50 per week from May 17, 1999 to December 31, 1999. From January 1, 2000 when Claimant reached MMI, to present and continuing, Claimant is entitled to permanent partial disability (PPD) at the same rate of $261.24 pursuant to Section 908(c).

3. Employer shall be entitled to a credit for compensation paid to Claimant after January 11, 1999.

4. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act.

5. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated at a rate equal to the 52-week U.S. Treasury Bill Yield immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

6. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

**ORDERED** this 5th day of June, 2001, at Metairie, Louisiana.

A
CLEMENT J. KENNINGTON
Administrative Law Judge